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ANN JOO INTEGRATED STEEL SDN BHD v. LIM CHUAN HOCK & SONS SDN BHD

HIGH COURT MALAYA, GEORGETOWN
LIM CHONG FONG J
[ORIGINATING SUMMONS NO: PA-24NCVC-357-04-2017]
29 AUGUST 2017

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CONSTRUCTION LAW: *Adjudication – Setting aside – Application for – Dispute as to balance amount payable for works done and completed – Whether adjudicator acted in excess of jurisdiction in allowing defendant's claim – Whether adjudicator allowed to refrain from utilising additional powers under s. 25(b) and (f) of Construction Industry Payment and Adjudication Act 2012 – Whether there had been denial of natural justice – Construction Industry Payment and Adjudication Act 2012, ss. 8, 15(b), (d), 21, 25(d), (i), (m) & 27*

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The plaintiff, a private limited company and the employer of the project to carry out construction works, appointed the defendant as its contractor to undertake the works pursuant to a contract. The defendant completed the works pursuant to the contract. The quantity surveyor engaged by the plaintiff to carry out the final measurement and valuation of the works was JUBM Sdn Bhd ('JUBM'). However, disputes arose between the parties in

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relation to the balance amount to be paid by the plaintiff for the work done and completed by the defendant. An adjudicator was appointed under s. 21 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') pursuant to the issuance and service of a notice of adjudication by the defendant on the plaintiff under s. 8 of the CIPAA. The basis of the claim

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stated by the defendant in the payment claim was for final account claim/ balance of adjusted contract sum totalling RM795,387.42. The defendant particularised the claim by stating that it comprised of the original contract sum of RM4,475,000 with total variations (RM991,497.68) added on and deducted the amounts that had been previously paid of RM2,741,526.02.

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There was no express mention of the claim being subject to lump sum contract or fixed price basis therein. The adjudicator allowed the defendant's claim 'but only for RM544,277.53 made up of unreasonably downward adjustment as per the performed re-measurement on BQ line items 3.3.2.2, 3.3.2.3, 3.3.2.4, 3.3.2.5 and 3.3.2.6 in Interim Certificate No. 12 (final) ...'. Dissatisfied with the decision of the adjudicator, the plaintiff applied to set

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aside the decision under s. 15 of the CIPAA on the grounds that the adjudicator had acted in excess of his jurisdiction and/or that there had been a denial of natural justice pursuant to ss. 15(d) and (b) of the CIPAA.

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Held (dismissing application with costs):

(1) There is procedural flexibility in the way the claims and defences are presented for an adjudication procedure under the CIPAA. Within the procedural fairness, the parties are not strictly bound by their presentation unlike the pleadings in civil litigation. The plaintiff had, on its own volition, put the re-measurement of the work in the recommendation for Final Account Certificate in issue in defence against the defendant's claim. The plaintiff attempted to take a strict and rigid stance in respect of the alleged lump sum contract basis of claim in the payment claim. (paras 27 & 29)

(2) The defendant's cause of action was for breach of contract for unpaid balance of payment for work done. The particulars of the claim as provided by the defendant in the payment claim were merely supplementary information to substantiate the claim so that the plaintiff was accordingly alerted. As a matter of fact, the plaintiff was not misled by the defendant. The defendant was comprehensively denied in the payment response because the plaintiff was able to justify that no payment was due and payable to the defendant based on the recommendation for Final Account Certificate issued by JUBM. (para 28)

(3) The correctness or otherwise of matters pertaining to the recommendation for Final Account Certificate, particularly the re-measured work, had been put into issue in the adjudication *vide* the payment response. The dispute over the balance of payment due to the defendant therefore necessarily encompassed dealing with the re-measured work too *albeit* it was not mentioned in the payment claim. Since the re-measured work was introduced *vide* the payment response, the adjudicator became clothed with jurisdiction to deal with it by virtue of s. 27(1) of the CIPAA and did not act in excess of his jurisdiction when he dealt with the re-measured work in the recommendation for Final Account Certificate. (paras 31-33)

(4) The adjudicator, an engineer by training and a construction claims consultant by profession, was amply qualified and perfectly able to review and revise the re-measured work on the available materials before him pursuant to his power under s. 25(d), (i) and (m) of the CIPAA. The adjudicator also had additional powers under s. 25(b) and (f) of CIPAA. These are powers and not duties of the adjudicator, in that, he was not obliged to utilise all or even any of them. There was no denial of natural justice if he refrained from utilising them. (para 41)

(5) The adjudicator had reviewed and revised the re-measured work in BQ items 3.3.2.2 to 3.3.2.6 of the recommendation for Final Account Certificate because he found them to be erroneously assessed by JUBM based on the 'not to scale' as built drawings provided by the plaintiff in the absence of the defendant's consent through a joint inspection. The plaintiff wanted to rely on the letter of JUBM as fresh evidence to explain the real reason of the downward adjustment being the redistribution of the re-measured work from BQ items 3.3.2.2 to 3.3.2.6. However, the letter was irrelevant and inadmissible for consideration at the stage of this application. Further, the reason of redistribution would likely be intertwined with the problem of the unsatisfactory 'not to scale' as built drawings because they had to be measured from that same source. (paras 41 & 42)

Case(s) referred to:

AWG Construction Services Ltd v. Rockingham Motor Speedway Ltd [2004] EWHC 888 ***(refd)***

BM City & Construction Sdn Bhd v. Merger Insight (M) Sdn Bhd & Another Case [2016] 1 LNS 1096 HC ***(refd)***

Gazzriz Sdn Bhd v. Hasrat Gemilang Sdn Bhd [2016] 1 LNS 1280 HC ***(refd)***

Herbosch-Kiere Marine Contractors Ltd v. Dover Harbour Board [2012] 140 Con LR 97 ***(refd)***

Milsonland Development Sdn Bhd v. Macro Resources Sdn Bhd & Another Case [2017] 1 LNS 183 HC ***(refd)***

Primus Build Ltd v. Pompey Centre Ltd and Another 126 Con LR 26 QB ***(refd)***

Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case [2017] 1 LNS 177 HC ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2017] 1 CLJ 677 CA ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd [2015] MLJU 695 ***(refd)***

Vital Talent Sdn Bhd v. Harmony Teamwork Construction Sdn Bhd [2017] 1 LNS 1161 HC ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 5, 6, 8, 9, 10, 11, 12(2)(a), 15(b), (d), 21, 25(b), (d), (f), (i), (m), 27(1)

For the plaintiff - Choon Hon Leng & Denise Cheong Lin Hwei; M/s Raja, Darryl & Loh
For the defendant - Ong Yu Shin; M/s The Chambers Of Yu Shin Ong

Reported by S Barathi

JUDGMENT

Lim Chong Fong J:

Introduction

[1] This is another application that came before me to set aside the decision of the adjudicator under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") after *Vital Talent Sdn Bhd v. Harmony Teamwork Construction Sdn Bhd* [2017] 1 LNS 1161; [2017] AMEJ 0854.

[2] The plaintiff is a private limited company and the employer of the project to carry out construction work known as "Cadangan Kerja Tambahan Ke Atas Bangunan Kilang Sediada Ann Joo Integrated Steel Sdn Bhd di atas Lot 1227 & 78 Dan Sebahagian Lot 1225 & 1236, Mukim 1, Kawasan Perindustrian Perai, Seberang Perai Tengah Pulau Pinang" ("works"). A

[3] The defendant is also a private limited company and is the contractor appointed by the plaintiff to undertake the works pursuant to a letter of award dated 18 February 2011 ("letter of award") together with the conditions of contract ("conditions of contract") (collectively known as "contract") for the contract sum of RM4,475,000. B

[4] There were disputes and differences that arose between the parties in relation to the contract and these disputes were referred to adjudication under the CIPAA before Chung Sheuan Seen ("adjudicator"). The plaintiff was the respondent whilst the defendant was the claimant in the adjudication proceedings. C

[5] The plaintiff was dissatisfied with the adjudicator's decision dated 23 March 2017 ("decision") and applied to set it aside pursuant to s. 15 of the CIPAA ("application"). D

Preliminary

[6] The affidavits that were filed in relation to this application are as follows: E

(i) Plaintiff's affidavit in support affirmed by Mabel Tio Mei Peng dated 21 April 2017;

(ii) Defendant's affidavit in reply (1) affirmed by Lim Jia Jian dated 16 May 2017; F

(iii) Plaintiff's affidavit in reply affirmed by Mabel Tio Mei Peng dated 1 June 2017;

(iv) Defendant's affidavit in reply (2) affirmed by Lim Jia Jian dated 13 June 2017; G

(v) Plaintiff's affidavit in reply (2) affirmed by Mabel Tio Mei Peng dated 21 June 2017.

[7] After having read the cause papers and written submissions filed by the parties, I heard oral arguments of counsel on 3 July 2017 and 3 August 2017. I thereafter adjourned the matter to deliberate on the arguments put forth. H

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[8] Accordingly, I now furnish below, my decision together with the supporting grounds thereof.

Brief Facts

[9] The defendant completed the works pursuant to the contract. The quantity surveyor engaged by the plaintiff to carry out, *inter alia*, final measurement and valuation of the works is JUBM Sdn Bhd ("JUBM").

[10] The disputes and differences that arose between them concerned the balance amount to be paid by the plaintiff for the work done and completed by the defendant.

[11] As the result, the defendant issued and served a payment claim dated 14 October 2016 pursuant to s. 5 of the CIPAA ("payment claim") amounting to RM795,387.42 upon the plaintiff.

[12] The plaintiff in response issued and served a payment response dated 31 October 2016 pursuant to s. 6 of the CIPAA ("payment response") upon the defendant.

[13] In consequence, the defendant issued and served a notice of adjudication dated 8 November 2016 upon the plaintiff pursuant to s. 8 of the CIPAA.

[14] The adjudicator was appointed by the Director of the Kuala Lumpur Regional Centre for Arbitration pursuant to s. 21 of the CIPAA on 30 November 2016.

[15] Accordingly, the defendant issued and served the adjudication claim dated 7 December 2016 pursuant to s. 9 of the CIPAA ("adjudication claim") upon the adjudicator and plaintiff.

[16] The plaintiff then issued and served the adjudication response dated 9 January 2017 pursuant to s. 10 of the CIPAA ("adjudication response") upon the adjudicator and the defendant.

[17] Thereafter, the defendant issued and served the adjudication reply dated 10 January 2017 pursuant to s. 11 of the CIPAA ("adjudication reply") upon the adjudicator and the plaintiff.

[18] The adjudicator finally made his decision dated 23 March 2017 pursuant to s. 12(2)(a) of the CIPAA. In the decision, the adjudicator stated as follows:

> (1) In the circumstances, it is my decision that the Claimant has succeeded in their claim but only for RM544,277.53 (RINGGIT MALAYSIA Five hundred and Forty Four Thousand and Two Hundred and Seventy Seven and Cents Fifty Three only) made up of unreasonably downward

adjustment as per the performed re-measurement on BQ line items 3.3.2.2, 3.3.2.3, 3.3.2.4, 3.3.2.5 and 3.3.2.6 in Interim Certificate No. 12 (final) by the Respondent/JUBM to previously claimed and duly certified/ paid work quantities.

Contentions And Findings

[19] In this application, the plaintiff is seeking to set aside the decision on the grounds that the adjudicator acted in excess of his jurisdiction and/or that there has been a denial of natural justice pursuant to ss. 15(d) and (b) of the CIPAA respectively. It is provided in s. 15 of the CIPAA as follows:

15. Improperly procured adjudication decision

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

(a) the adjudication decision was improperly procured through fraud or bribery;

(b) there has been a denial of natural justice;

(c) the adjudicator has not acted independently or impartially; or

(d) the adjudicator has acted in excess of his jurisdiction.

[20] The plaintiff asserted that it is an aggrieved party for the purposes of s. 15 of the CIPAA because the decision resulted in a debt that the plaintiff has to pay the defendant even though the plaintiff has already paid all the amounts due under the recommendation for final account certificate commonly understood by the parties as interim certificate no. 12 (final). They are synonymous.

[21] Before I deal with the contentions of the plaintiff, it is apt that I set out and be reminded on the jurisprudence of the CIPAA as expounded eloquently by Hamid Sultan Abu Backer JCA in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2017] 1 CLJ 677 as follows with emphasis added by me:

[14] *The CIPAA 2012 has been formulated to provide a summary relief to meet with construction-related claim.* It is not the function of the court to review the decision of the adjudicator relating to quantum in detail as the Act itself provides a mechanism by way of arbitration and/or litigation to sort out the final accounts of the parties, wherein the adjudicators' award can be reviewed. It is important for the courts to take cognisance of the short title and commentary to the Act which reads as follows:

> An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.

A [15] *What it means strictly is that the court should for all intent and purpose facilitate regular and timely payment and ought not be engaged by dilatory and/or abusive applications to oppose the award and/or stay of the award as evident also by case laws in many other jurisdictions.*

[22] In dealing with a s. 15 application or for that matter, s. 16 application, B the court may take cognisance of the salutary guidance of Dyson J (as he then was) in *Macob Civil Engineering Ltd v. Morrison Construction Ltd* [1999] BLR 93, where His Lordship in dealing with a similar Act, had this to say:

> The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring C the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see s. 108(3) of the Act and paragraph 23(2) of Part 1 of the Scheme. The timetable for adjudications is very tight (see s. 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. D So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (s. 108(2)(e) of the Act and paragraph 12(a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (s. 108(2)(f) of the Act and E paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct on entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find F difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.

G (See Paper by Lim Chong Fong titled '*The Legal Implications of CIPAA*', presented at the Construction Industry Payment & Adjudication Act (CIPAA) 2012 Conference organised by KLRCA).

[23] *The guidelines of the English Court of Appeal in Carillion Construction Limited v. Devonport Royal Dockyard Limited [2005] EWHC 778, will be helpful when* H *hearing a s. 15 application. The English Court of Appeal had asserted: (i) the unsuccessful party must pay the adjudication award and if he is not happy, must challenge it through arbitration proceedings; (ii) challenges based on excess of jurisdiction and/or breach of natural justice (save in the plainest cases) ought not be entertained or words to that effect.* The view expressed by the English Court I of Appeal *inter alia* reads as follows:

85. The objective which underlies the Act and the statutory scheme requires the Courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to the DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".

86. *It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels of "excess of jurisdiction" or "breach of natural justice".* It must be kept in mind that the majority of the adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. *The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his subcontractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions.* Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense - as, we suspect, the costs incurred in the present case will demonstrate only too clearly. (emphasis added)

In addition, it is worthwhile to refer to the English case of *Herbosch-Kiere Marine Contractors Ltd v. Dover Harbour Board* [2012] 140 ConLR 97 where Akenhead J held as follows with emphasis also added by me:

> 21. It is now well established that mere mistake of fact or law on the part of the adjudicator in his or her decision does not give grounds to challenge the enforceability of the decision (see for instance *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd* [2000] BLR 522). The Court of Appeal in *Carillion Construction Ltd v. Devonport Royal Dockyard Ltd* [2006] BLR 15 also suggested that judges should deal relatively robustly with challenges on jurisdictional or fairness grounds: "85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment". Judgment Approved by the court for handing down Re Dover Harbour Board 86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions … 87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules

of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly.

22. However, these points were developed in the decision of this Court in *Cantillon Ltd v. Urvasco Ltd* [2008] BLR 250: "53. Whilst that case is, obviously, not authority for the proposition that a "good" challenge to a decision on jurisdiction or natural justice grounds will be excluded on some statistical basis, a challenge on these grounds must be plain, clear and relatively comprehensible. In a case such as the present, the Adjudicator, *albeit* experienced, had a mass of conflicting evidence and argument to take on board. *The Court should not take an over-analytical approach to questions of jurisdiction and natural justice arising in adjudications under the HGCRA 1996* … 55. There has been substantial authority, both in arbitration and adjudication, about what the meaning of the expression "dispute" is and what disputes or differences may arise on the facts of any given case. Cases such as *Amec Civil Engineering Ltd -v- Secretary of State for Transport* [2005] BLR 227 and *Collins (Contractors) Ltd -v- Baltic Quay Management* (1994) Ltd [2004] EWCA *(Civ)* 1757 address how and when a dispute can arise. *I draw from such cases as those the following propositions: (a) Courts (and indeed adjudicators and arbitrators) should not adopt an over-legalistic analysis of what the dispute between the parties is. Judgment Approved by the court for handing down Re Dover Harbour Board (b) One does need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is. (c) One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party or to each other before the referral to adjudication or arbitration. (d) The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration … From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases: (a) It must first be established that the Adjudicator failed to apply the rules of natural justice; (b) Any breach of the rules must be more than peripheral; they must be material breaches; (c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant. (d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this. (e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Ltd -v- The Camden Borough of Lambeth was concerned comes into play . It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.* (emphasis added)

A *Adjudicator Acted In Excess Of Jurisdiction*

[22] In this respect, Mr Choon Hon Leng of counsel for the plaintiff argued that the adjudicator decided on the matter and awarded the adjudicated sum to the defendant on a basis that was neither claimed, raised, argued or contemplated in the payment claim and payment response. In short, the
B adjudicator decided on a matter which was not the dispute that had been referred to adjudication. The defendant was hence in the adjudication bound by the case it presented to the adjudicator. In *View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 at first instance, Mary Lim Thiam Suan J (now JCA) held as follows:

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> [66] With respect, the Court finds these concerns misplaced. It may be said that by virtue of subsection 27(1), the Payment Claim and the Payment Response is to the adjudication what pleadings are to civil litigation; in adjudication, those pleadings are to be found in the Payment Claim and the Payment Response; and not in the Adjudication Claim, Adjudication Response or the Adjudication Reply.

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[23] According to Mr Choon, the defendant claimed for the sum of RM795,387.42 in the payment claim for works purportedly done under the contract on the basis that the contract is a lump sum contract and the amount claimed represented the balance value of the contract price with variation
E orders. No other or alternative basis of claim was put forth by the defendant. The plaintiff disputed the defendant's claim in the payment response that the contract was not a lump sum contract but was instead subject to re-measurement. Based on the re-measurement as undertaken by JUBM contained in the recommendation for final account certification, the plaintiff
F had paid the defendant all amounts due thereunder.

[24] The adjudicator in his decision agreed with the plaintiff that the contract was not a lump sum contract and was subject to re-measurement. He said as follows in the decision:

> 70) I note that this contract is termed a "Fixed price basis."

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> 71) The use of this term coupled with the respondent detailed elaboration on this matter particularly relating to Lump Sum/Re-measurement, I am of the opinion this contract should not be considered a Lump Sum contract. This is evident in the valuation of performed according to the BQ line items, as elaborated further below.

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> 72) In addition, I hold that re-measurement would have to be done as provisioned under the Contract.

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However and that notwithstanding, the adjudicator did not dismissed the defendant's claim on the basis as claimed but had instead ventured further and did his own evaluation of the re-measurement by JUBM in the recommendation for final account certificate.

[25] Mr Choon therefore submitted in conclusion that the adjudicator did not have the jurisdiction to deal with the matters pertaining to the recommendation for final account certificate. Its correctness or otherwise was not a dispute referred to adjudication and in this regard, the plaintiff referred to the English case of *AWG Construction Services Ltd v. Rockingham Motor Speedway Ltd* [2004] EWHC 888 (TCC) where Toulmin J held as follows:

> [141] In my view, each case must depend on the circumstances and the context in which the referral is made. In some cases, the issues referred are very specific. In other cases it is clear that the issues are more general and have been so treated by the parties, and that there is significantly more room for the case to be developed. The test in each case is first what dispute did the parties agree to refer to adjudication? And, secondly, on what basis? If the basis which is argued in the adjudication is wholly different to that which a Defendant has had an opportunity to respond in advance of the adjudication, this may constitute a different dispute not referred to the adjudicator or, put another way, insofar as the adjudicator reaches a decision on the new issues, it is not responsive to the issues referred to him.

[26] In opposition thereto, Mr Ong Yu Shin of counsel for the defendant argued that the plaintiff's assertion is erroneous if not also absurd. It was submitted by the defendant that the issue of whether the contract is a fixed price re-measurement contract is a legal issue for determination but not the confines of jurisdiction. The defendants' claim is in substance for balance of payment for work done and the plaintiff knew of it. However, the plaintiff contended that there was no further payment due. The aforesaid legal issue is merely an argument associated thereto as to whether balance of payment is due or otherwise. In *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case* [2017] 1 LNS 177, Lee Swee Seng J held as follows:

> [57] It cannot be gainsaid that in the present case, the Respondent had no problem responding to the Claimant's payment Claim, giving reasons why it is disputing the whole of the Claim. The Respondent, had been able through their solicitors, to respond astutely and appropriately. The Court should not exact a stricter requirement of pleadings on Adjudication than if it were a Court proceeding. One should not be unduly critical or technical to the point of exacting an overly demanding treatment of a Payment Claim when it comes to whether it has met the requirements of section 5(2)(b) CIPAA.

[27] I have perused both the payment claim and payment response submitted by the defendant and the plaintiff respectively. I observed that the basis of the claim stated by the defendant in the payment claim is for final account claim/balance of adjusted contract sum totaling to RM795,387.42. As to particulars of the claim, the defendant stated that it comprised of the original contract sum of RM4,475,000 with total variations of (RM991,497.68) added on and deducting amounts previously paid of RM2,741,526.02 totaling to the aforesaid RM795,387.42. There is no express mention of the claim subject to lump sum contract or fixed price basis therein.

Being familiar with the construction jargon, I know the plaintiff deduced that the defendant relied on the lump sum basis merely because the defendant's claim for work done is for the full original contract sum. Unless expressly so stated as non-adjustable lump sum in the payment claim, it is my view that *per se* is inconclusive as to the precise intention of the defendant. It need not necessarily be as so asserted by the plaintiff. It could equally be that the defendant did not consider the original bills of quantities (BQ) measurements in the contract erroneous that required re-measurement.

Be that as it may, the plaintiff in the payment response expressly stated as follows:

> 5.3 Based on recommendation for Final Account prepared by the Quantity Surveyor JUBM Sdn Bhd, the total value of the Contract is RM2,741,526.02. Such amount was derived based on the re-measurement of all the works that your client has carried out under the Contract based on the as-built drawings (which can still be verified at site).
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> 5.4 In other words *(sic)*, the amount recommended by the Quantity Surveyor is the amount of actual work done by your client.
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> …
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> 6. In the circumstances, our client denies owing your client the sum of RM795,387.42 or any part thereof. All claims and allegations made in the Payment Claim are denied and disputed.

By so stating, it is plain that the plaintiff had on its own volition put the re-measurement of the work in the recommendation for final account certificate in issue in defence against the defendant's claim.

[28] I am further aware the plaintiff attempted to take a strict and rigid stance in respect of the alleged lump sum contract basis of claim in the payment claim. Accordingly, the plaintiff contended that the defendant must be bound by that alleged lump sum basis in the adjudication. Besides my aforementioned finding that the alleged lump sum contract basis relied upon by the defendant is, in fact, inconclusive, it is however my view that the basis

alluded to by Toulmin J in *AWG Construction Services Ltd v. Rockingham Motor Speedway Ltd (supra)* simply meant the legal cause of action pursued in the payment claim. In this regard, the defendant's cause of action is to me for breach of contract for unpaid balance of payment for work done. The particulars of the claim as provided by the defendant in the payment claim are merely supplementary information to substantiate the claim so that the plaintiff is accordingly alerted. As a matter of fact, the plaintiff was not misled by the defendant at all. The defendant's claim was comprehensively denied in the payment response because the plaintiff was able to justify that no payment was due and payable to the defendant based on the recommendation for final account certificate issued by JUBM.

[29] Moreover, the adjudication procedure under the CIPAA is unlike court litigation where there are detailed procedural rules provided in the Rules of Court 2012 including on pleadings. In other words, there is procedural flexibility even in the way the claims and defences are presented. Thus, within limit of procedural fairness, the parties are also not strictly bound by their presentation unlike that of pleadings in civil litigation and I echo the views of Lee Swee Seng J in para [57] of *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Other Case (supra).*

[30] As to the matter of jurisdiction, it is clear that s. 27 of the CIPAA provides as follows:

> **27. Jurisdiction of adjudicator**
>
> (1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.
>
> (2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.
>
> (3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

[31] From my perusal of the payment claim and payment response, I am of the view that the correctness or otherwise of matters pertaining to the recommendation for final account certificate particularly the re-measured work had been put into issue in the adjudication *vide* the payment response. Put simply, the dispute over the balance of payment due to the defendant therefore necessarily encompassed dealing with the re-measured work too *albeit* it was not mentioned in the payment claim.

[32] Since this re-measured work was introduced *vide* the payment response, it is my view that the adjudicator became clothed with jurisdiction to deal with it by virtue of s. 27(1) of the CIPAA. It might have been different if the payment response made no mention of any re-measurement in reply to the payment claim. I observed that Toulmin J went on to say as follows in *AWG Construction Services Ltd v. Rockingham Motor Speedway Ltd (supra)*:

> [142] It seems to me, following *Halki Shipping*, that a wide interpretation should be given to the words "dispute" so that the adjudicator's jurisdiction is preserved where possible. In appropriate cases falling short of the case where the issues are wholly different, the concept of procedural fairness should be sufficient to ensure that a party would not be prejudiced by the finding of an adjudicator where the case has been developed in the course of the adjudication.

[33] In the circumstances, I find and hold that contentions put forth by the plaintiff are misconceived as well as unsustainable. The adjudicator did not act in excess of his jurisdiction when he dealt with the re-measured work in the recommendation for final account certificate.

Denial Of Natural Justice

[34] Mr Choon went on to contend on behalf of the plaintiff that even if the adjudicator had jurisdiction to determine the re-measured work, he had the duty and obligation to comply with the principles of natural justice and in this instance, by giving the parties the opportunity to be heard. Reference was made to the English case of *Primus Build Ltd v. Pompey Centre Ltd and Another* 126 Con LR 26 QB where Coulson J held as follows:

> [40] As I have said, these things are always a matter of fact and degree. An adjudicator cannot, and is not required to, consult the parties on every element of his thinking leading up to a decision, even if some elements of his reasoning may be derived from, rather than expressly set out, in the parties' submissions. But where, as here, an adjudicator considers that the referring party's claim as made cannot be sustained, yet he himself identifies a possible alternative way in which a claim of some sort could be advanced, he will normally be obliged to raise that point with the parties in advance of his decision. It seems to me that that principle must apply a *fortiori* in circumstances where the document from which the alternative approach is derived, is a document which the adjudicator was told by the parties to ignore. In those circumstances, common sense demands that, before reaching any conclusion, the adjudicator must ask the parties for their submissions on that alternative approach.

[35] According to Mr Choon, the adjudicator had ascertained that the defendant's claim as presented could not be sustained and then himself proceeded to identify a possible alternative way in which the claim of some sort could be advanced. He thereafter evaluated the correctness of the recommendation for final account certificate by comparing it with the previous interim payment certificate.

In this regard, Mr Choon stressed that the adjudicator must raise his intended evaluation in advance of his decision because it is obligatory of him to do so as only he knew of the alternative method. He lacked the necessary facts and evidence for him to do the evaluation but went ahead to make his decision based on insufficient facts and evidence. The evaluation concerned five re-measured work items and the adjudicator re-valued them. He found there was unreasonable downward adjustment of the five re-measured works items by JUBM that resulted in the shortfall of RM544,277.53 which has to be paid by the plaintiff to the defendant. The plaintiff contended that this resultant financial impact is significant and material on the outcome of the adjudication.

[36] The plaintiff then post the adjudication decision sought clarification from JUBM and by letter dated 13 April 2017, JUBM responded that there was no unreasonable downward adjustment but the five re-measured work items were in fact distributed under a different section of the BQ. In this respect, the plaintiff hence contended that the adjudicator breached natural justice by failing to afford the plaintiff or JUBM to explain to him the downward adjustment during the adjudication but before making the decision. The adjudicator would have otherwise reached a different conclusion. As the result, the plaintiff now ended up paying twice to the defendant.

[37] On the other side, Mr Ong on behalf of the defendant denied that there was any breach of natural justice. Firstly, the defendant contended that the dispute over the re-measured work which was first raised in the payment response and subsequently repeated in the adjudication response by the plaintiff was in fact rebutted by the defendant in its adjudication reply. It is clear that the defendant challenged the accuracy of the measurements including its methodology, contemporaneous record keeping a well as the valuation of the work. However, the plaintiff did not thereafter seek leave from the adjudicator to furnish a rejoinder or further documentary evidence.

[38] In addition, the defendant objected to the attempt by the plaintiff to admit the letter of JUBM dated 13 April 2017 because it amounted to fresh evidence that was not before the adjudicator. In this connection, Lee Swee Seng J held as follows in *Gazzriz Sdn Bhd v. Hasrat Gemilang Sdn Bhd* [2016] 1 LNS 1280:

A [31] The Respondent has totally misconceived the ground of natural justice in its attempt to set aside the Adjudication Decision. To begin with, even if there be some truth in the Respondent's assertion that the amount owing to the Claimant should be a very much less amount of RM 603,981.32, that so-called error of the Adjudicator cannot be attributed to a breach of natural justice. To be clear, this so-called fresh evidence was
B not before the Adjudicator. Surely the Adjudicator cannot reopen the Adjudication Proceeding after the delivery of his Adjudication Decision and neither would this Court at this stage of setting aside the Adjudication Decision under the limited grounds of section 15 CIPAA allow the so-called fresh evidence to be admitted. There is simply no room for that altogether as this application is not an appeal.

C

[39] In any event, the defendant submitted that the adjudicator had properly determined the issues and made his decision within the reference of the parties and materials available before him in the adjudication. Moreover, in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd (supra)*, Hamid
D Sultan Abu Backer JCA held as follows:

So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (s.108(2)(e) of the Act and paragraph 129a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and
E the law (s.108(2)(f) of the Act and paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct on entirely inquisitorial process, or he may, as in the present case, invite representations from the parties.

[40] As to the re-measured works, I find that the adjudicator went through the materials put forth by the parties meticulously and held as follows in his decision with emphasis added by me:

F

12.11.2. Observations #1 on Interim Certificate No.12 (final) versus IPC no. 10

73) Scanning through the BQ line items breakdown as provided in the Interim Certificate No. 12 (final), some general observations can be made
G as follows:

a. More than Tender BQ Quantities: Among provided breakdown by means of BQ line items, some were showing certified quantities higher than the tendered BQ quantities.

b. Less than Tender BQ Quantities: On the other hand, some BQ line
H items were showing certified quantities less than the tendered BQ quantities. This is seen as an effect of omission of scope (re-measured), where the actual quantities expended were less than tendered.

I

74) The above observations on the factual data provide compelling proof that re-measurement was effected, not only at the end of the project but also during the course of the project (as evident in IPC10, prior to IPC12),.

12.11.3 Observations #2 on Interim Certificate No.12 (final) versus IPC No. 10

75) Further detailed scanning of the BQ line items breakdown as provided in the Interim Certificate No. 12 (final), the following categories of observations are made:

a) IPC12 valuation Unchanged vs IPC10: The certified quantities for some line items were stated to be "as per IPC10":

   Within this set of BQ line items, some were originally certified to be 0 (as per IPC10) and remained certified to be 0. This is seen to amount to omission under the various negative VOs as elaborated above.

b) IPC12 valuation increased vs IPC10: The certified quantities for some line items were shown to have decreased versus previously certified in IPC10.

c) IPC12 valuation decreased vs IPC10: The certified quantities for some line items were shown to have decreased versus previously certified in IPC10.

This is particularly pertinent to BQ line items 3.3.2.2 to 3.3.2.6.

It is observed the application of the said As-built drawings in the re-measurement exercise had led to significant reductions in certified quantities to 560.07 versus the previously certified (and paid) quantities as follows:

No.	BQ line item	Original quantities	IPC10 certified quantities	IPC12 certified quantities
1.	3.3.2.2	7,997m2	12,626.43m2	566.07m2
2.	3.3.2.3	7,000m2	10,769.27m2	560.07m2
3.	3.3.2.4	6,675m2	13,555.36m2	560.07m2
4.	3.3.2.5	7,000m2	10,769.27m2	560.07m2
5.	3.3.2.6	6,675m2	10,769.27m2	560.07m2

76) This observed magnitude of downward adjustments in the range of 90% to 95% reduction of previously claimed, certified and paid quantities is seen to be rather unexpected and unusual, notwithstanding the provisional re-measurement.

77) Further checks on IPC10 JUBM valuation breakdown, the detailed valuation of the above BQ line items appear to have been omitted in JUBM's valuation as received from JUBM or left out in the CABOD compilation.

…

78) As such, I can only assume the side notes found in JUBM IPC12 valuation detailed breakdown pertaining to previously certified IPC10 quantities to be valid as indicated.

12.11.4 Observations #3 on Interim Certificate No.12 (final)

79) Also, further check on the Re-measurement calculation pages shows that JUBM had taken As-built drawings as prepared and provided by the Respondent to derive and establish the "re-measured" quantities.

…

b. At the same time I too note the earlier elaborated As-built Drawings issues from the Claimant including the Respondent's point.

c. A closer check of the said attached As-built drawings as provided by the Respondent to JUBM shows it was marked as "Scale: N.T.S.", which may reasonably be interpreted as "not to scale".

…

80) Generally, in my opinion, for quantities take-off from any given drawings, the scale setting is of utmost importance, particularly if it relates and directly determine the quantities of work and thus payment. While this may not be as detrimental to the re-measurement exercise, nevertheless serious doubts are raised.

81) Further review and checks of the documents reveal that Claimant had raised concerns on:

a. belated queries and challenges by JUBM to claimed quantities *via* the draft Final Statement of Final Account

b. The apparent failure by the Respondent/JUBM to conduct contemporaneous joint site inspection

c. Belated requests for joint inspections and other quantities confirmation with Respondent Site team after 2-4 years of site taking over on 14th September 2012. The only sighted joint inspection records in the document bundles was for CMGD inspection dated 29th September 2014.

12.11.15 Findings and Conclusions on Re-measurement

82) In the light of:

The apparent serious deviation and adjustment downward of previously certified/paid work quantities (as highlighted above for BQ line items 3.3.2.2, 3.3.2.3, 3.3.2.4, 3.3.2.5 and 3.3.2.6) versus the belated re-measured quantities in Interim Certificate no. 12 (final) done after 39 months;

The use of Respondent provided as-built drawings which was identified to be not to scale in the belated re-measurement of the said BQ items by JUBM;

Coupled with the surrounding circumstances of lack of recorded/sighted contemporaneous joint site valuation inspections by Respondent (employer) and/or his Quantity Surveyor consultant (JUBM) with the Claimant (contractor) to establish a sound and reliable basis of re-measured quantities,

This gives a strong impression of "after the fact adjustments" of whether rightfully or wrongly previous certified/paid works of such magnitude *via* re-measurement exercise on specific BQ line items.

83) The fact that an external professional quantity surveying consultancy as engaged by the Respondent did not manage to regularly conduct periodic site valuation inspections and/or establish as well as retain the required proper contemporaneous work progress records for progress certification and payment purposes is not comprehensible.

…

87) On these premises, I opine the basis and manner of re-measurement performed by the Respondent/his consultant onto these specific BQ line items as it stands now cannot be right, barring further substantiated proofs, particularly given the long time lapse and unreliable source of As-built records/basis used.

88) As such, I hold this particular Re-measurement (which includes and encompasses positive VO3 and negative VO5) in relation to major downward adjustments of previously claimed and duly certified/paid work quantities to be unreasonable.

[41] It is therefore clear that the adjudicator reviewed and revised the re-measured work in BQ items 3.3.2.2 to 3.3.2.6 of the recommendation for final account certificate because he found them to be erroneously assessed by JUBM based on the "not to scale' as-built drawings provided by the plaintiff in the absence of the defendant's consent through a joint inspection. The adjudicator is an engineer by training and a construction claims consultant by profession. I am of the view that he is amply qualified and perfectly able to review and revise the re-measured work on the available materials before him pursuant to his power under s. 25(d), (i) and (m) of the CIPAA that read: "Draw on his own knowledge and expertise", "Inquisitorially take the initiative to ascertain the facts and the law required for the decision" and "Review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute" respectively. There is no doubt that the adjudicator also has the additional powers under ss. 25(b) and (f) of the CIPAA that read: "Order the discovery and production of

documents" and "call for meeting with the parties" respectively. It must, however, be understood that these are powers and not duties of the adjudicator. In other words, he was not obliged to utilise all or even any of them. There is no denial of natural justice if he refrained from utilising them: see also *Milsonland Development Sdn Bhd v. Macro Resources Sdn Bhd & Another Case* [2017] 1 LNS 183. It must not be forgotten that adjudication under the CIPAA is a speedy rough justice procedure that is only binding but not final. Any party aggrieved can always resort to detailed fine justice procedure by way of arbitration or litigation in the construction court.

[42] I am mindful the plaintiff wanted to rely on the letter of JUBM dated 13 April 2017 that was challenged by the defendant as fresh evidence to explain the real reason of the downward adjustment being the re-distribution of the re-measured work from BQ items 3.3.2.2 to 3.3.2.6 in respect of Road Pavement 4000mm wide to BQ items 3.3.3.2 to 3.3.3.6 in respect of Road Pavement over 4000mm wide. Consequently and in the absence of this explanation put forth to the adjudicator, the plaintiff was denied natural justice and thereby prejudiced. As alluded to by Lee Swee Seng J in *Gazzriz Sdn Bhd v. Hasrat Gemilang Sdn Bhd (supra)*, I hold that the letter is firstly irrelevant and inadmissible for consideration at the stage of this application. That notwithstanding and secondly, the reason of re-distribution would in my view likely be inter twined with the problem of the unsatisfactory "not to scale" as built drawings because they had to be measured from that same source. The argument could hence be seemingly a 'red-herring'.

[43] I am also mindful that the plaintiff argued that by the adjudicator's readjustment of the BQ items 3.3.2.2 to 3.3.2.6 only, the resultant effect would be to overpay the defendant because the adjudicator did not take BQ items 3.3.3.2 to 3.3.3.6 as valued in the recommendation for final account certificate into consideration and adjustment as well. From the perusal of the evidence available before me, I am uncertain if that would be necessarily so as alluded by the plaintiff. In any event, this touches upon and concerns the merits of the decision. A setting aside application pursuant to s. 15 of the CIPAA is however not an appeal. It is instructive to refer again to Lee Swee Seng J who held the following in *BM City & Construction Sdn Bhd v. Merger Insight (M) Sdn Bhd & Another Case* [2016] 1 LNS 1096:

> [62] I agree with learned counsel for MISB that even if there was a failure to take into account of payment made to the NSCs, it is merely an error of findings of facts/law. Such an error does not require the Adjudication Decision to be set aside. There will not be a denial of natural justice if the Adjudicator had addressed all the right issues even in the wrong way. The adjudicator's decision will nevertheless be temporary binding. It is only when the adjudicator has answered the wrong issues that his decision will be a nullity. See *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041; *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728.

[44] Hence, I am satisfied that the adjudicator had answered the right issue but if the plaintiff is dissatisfied with the answer, the proper recourse must be to proceed for final determination either by way of arbitration or litigation in the construction court.

[45] In the circumstances herein, I find and hold there was no denial or breach of natural justice by the adjudicator as that prescribed in *Herbosch- Kier Marine Contractors Ltd v. Dover Harbour Board (supra).* He had in my view acted properly and lawfully at all material times.

Conclusion

[46] For the foregoing reasons, I therefore disallow the application with costs of RM20,000.